IN THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

DIVISION II

NO: 42893-8-II

STATE OF WASHINGTON

Respondent,

v.

MICHAEL SHANNON DEROUEN,

Appellant.

DIRECT APPEAL OF:
PIERCE COUNTY SUPERIOR COURT
CAUSE NUMBER 10-1-01192-9
PIERCE COUNTY JUDGE BEVERLY GRANT.

APPELLANT'S PRO SE SUPPLEMENTAL BRIEF PURSUANT RAP 10.10

Presented by
Michael S. Derouen
Pro Se

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SUBSTANTIVE ISSUES

A. There was Insufficient evidence as to the Charged Crime in Count II, to support the conviction based upon the fact that there was no evidence entered to prove a crime had been committed beyond a reasonable doubt.

B. There was Insufficient evidence as to the Charged Crime in Count I, to support the conviction based upon the fact that there was no evidence entered to prove a crime had been committed beyond a reasonable doubt.

C. The State violated Appellant's Constitution Rights when it Punished Appellant for Exercising his Constitutional Right to a Jury Trial. And Added Additional Charges when he refused to plead guilty to a crime he did not commit.

D. The Sentencing Court violated the Sentencing guidelines when it imposed a sentence based upon an incorrect calculation under RCW 9.94A.525, of the Offender Score, Same Criminal Conduct, and the Guidelines itself, that should have been based upon the Laws of 2004.

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STATEMENT OF CASE.

Appellant Michael Shannon Derouen, Pro Se, with Counsel submits to this Court his Pro Se Supplemental Brief in Support of the Direct Appeal. And states that the following Facts are True and Correct as to the Trial Court Record of the Pierce County Superior Court case of State v. Derouen, #10-1-01192-9. Further, The Alleged Crimes herein, allegedly took place over a period of time from June 1, 2004 and Ended on March 2005. (8 months) Appellant asks this Court that when it Reviews the Evidence, and the Lack therein, that at all times keeps these dates in mind.

Appellant was Charged originally on March 18, 2010 with Two (2) Counts of Rape of a Child in the Third Degree. Against Brittany DeWitt.

After over a year of court hearings, and delay's by the prosecution and assigned counsel, the State Amended the information when Appellant refused to plead guilty to the original charging.

The State at a hearing on April 27, 2011 Amended the Information and charged Appellant with Four (4) Counts of Rape of a Child in the Third (3rd) Degree, pursuant to RCW 9A.44.079. Adding Two Count. (CP. 59 & 60)

The State of Washington's Charging Information alleged that Appellant committed the Crimes charged against Brittany DeWitt (hereinafter known as B.D) Between

the Dates of June 1, 2004 through June 26, 2004, for Count I. Count II, June 27, 2004. Count III, June 28, 2004, through October 31, 2004. And Count IV. November 1, 2004 through March 2005. And Each Act being Separate and Distinct Act from Each Count. The Probable Cause remained the Same, and the only purpose for the Additional Charges was Appellant's refusal to Plead Guilty.

At Trial the State introduced testimonial evidence from two other Girls, who allegedly had sex with Appellant (during the exact same time period) that were separate from "the alleged victim." The Testimony given alleged that Appellant had sex with minor girls, which were "uncharged crimes" to prove that Appellant had a pattern, and to prove the charged crimes against Appellant. The Girls herein referred to as J.S. (Jennifer Smith) and D.L. (Dekecia Lopez).

The Police Detective in this case, used uncharged victim D.L. for the investigation and to make several phone calls to in which it was hoped to get a confession out of Appellant that could be used in the Court. Over at Trail Counsels Objections the Court Admitted the Recording against Appellant to show "He told her (DL) he love her". RP. 188-89.

At Trial the State produced no physical evidence or circumstantial evidence to support the alleged crimes other than the testimony of the alleged victim, who

testified that she babysat the children of Appellant from mid 2003 through 2004-2005., but could not remember any specific dates, other than she Babysit for Appellant on "Wednesday's and Thursday's," which under her testimony was the only times she was at Appellant's residence where the alleged crimes took place. RP. 336.

The only times that B.D. was at Appellant's Residence was when his then Wife Catherine Merrit, asked/called B.D. to come and babysit Appellant's three (3) Young Children. RP. 335, 336, 561, 595.

The witness/victim testified she could remember only One (1) Specific Date in which she and the Appellant had sex, which was "June 27, 2004". As to which was the First time B.D. and Appellant allegedly had Sex. as charged in Count II. See Chargig Information CP. 59-60.

Appellant's Counsel showed that the Court and the Jury that the Date of June 27th, 2004 was a Sunday. And could not have been a Wednesday or a Thursday. RP. 506.

The bases of Count II, is the fact that the victim, remembered the date because it was the date she lost her virginity, and it was the same 27th day of the month that her birthday fell upon. But she could not remember the time of day, despite the fact that the date was on a Sunday and specifically remembered, and not on her babysitting day's to be at the residence. RP. 319. For the alleged victim would only go to the residence when

called on her day to babysit. RP. 342, 394, 395, 396, 400, 566.

The Victim B.D. testified that starting some time in June of 2004 she and Appellant had oral Sex. RP. 350, 354, 356. And that it had only happened Once, maybe twice. RP. 356, line 9.

Each alleged count in the charging Information occurred in the Evening, after School, and after school events (honors program, arts club, Gay/Straight Alliance, and Two other clubs) and the victims other job of Glass Blowing. RP. 332. With no Specific dates or without any specified days.

The Victim B.D. testified that she broke off the relationship in December 2005 or January of 2006. RP. 361. And then again testified she broke it off some time in the winter of 2005. RP. 375-76. 399.

Defense witness Catherine Merrit, testified that she stopped calling B.D. to babysit the winter of December-January 2004-2005. RP. 567, 568.

Appellant took the stand in his own defense and denied ever having any sexual contact with B.D. and the State Introduced Evidence of a Tape-Recording conversation of Appellant over the Objections of Counsel. The Recording only showed that Appellant had told D.L. (not charged with any crime against her) that he loved her. RP. 188-92, 625.

The Jury found Appellant guilty as charged of Four (4) Counts of Rape of a Child in the Third Degree as Charged in the Information. RP. 733. And each Juror's during Poling stated that they had been unanimous in their decision. RP. 734.

The Trial Court imposed a "Mandatory" Sentence, of 60 months, based upon the State's Recommendations, that the Offender Score was 9 Points. (Appellant had no Prior Criminal History).

This Appeal follows the Pierce County Trial, and subsequent conviction of Appellant in Timely Manner and proper form.

ARGUMENT PRESENTED.

A. SUFFICIENCY OF THE EVIDENCE OF THE CHARGED CRIME IN COUNT II. PROOF BEYOND A REASONABLE DOUBT.

Appellant states and argues that there is Insufficient Evidence to support the Crime Charged in Count II of the Charging Information.

Count II reads;

> And I MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington do accuse Michael Shannon Derouen of the crime RAPE OF A CHILD IN THE THIRD DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows;
> That Michael Shannon Derouen, in the State of Washington, on or about the 27th day of June 2004, did unlawfully and feloniously, being at least 48 months older than B.D. (DOB 3/27/1989), who is at least 14 years old but less than 16 years old and not married to the defendant, contrary to RCW 9A.44.079, and against the peace and dignity of the State of Washington."

The test for determining sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against

the defendant. Salinas, 119 Wn.2d at 201, State v. Craven, 67 Wn.App. 921, 928, 841 P.2d 774 (1992).

Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas 119 Wn.2d at 201, Craven 94 Wa.App. 928.

Appellant states that there was Insufficient Evidence to Prove the Crime Charge in Count II. In this case the Crime here has four (4) Elements to the crime, in Count II, which were found in the Jury Instructions. (1) That on or about the 27th day of June, 2004, the defendant had sexual intercourse with B.D. and that this act was a Separate and Distinct act from that supporting Counts I, III and VI; (2) That B.D. was at least fourteen years old but less than sixteen years old at the time of the sexual intercourse and was not married to the defendant; (3) That B.D. was at least 48 months younger than the defendant; and (4) The acts occurred in the State of Washington. See Jury Instruction #8.

Appellant states that there was Insufficient Evidence as to the Date of the Crime in Count II. Which is the Crime of "Rape in the Third Degree, that on or about the 27th

day of June 2004." As testified to. RP. 352 Lines 21-24.

Appellant proved at Trial that the 27th day of June was a Sunday. And per the Testimony of the Victim B.D. she was only at the residence on Wednesday's and Thursday's. RP. 336.

After reviewing the Evidence in the most favorable light to the State. No Rational Trier of fact could have found the essential elements of this crime beyond a reasonable doubt. See State v. Smith 155 Wn.2d 496, 501, 120 P.3d 559 (2005). For here in this case the Only Evidence as to the Crime Charged in Count II. Was that B.D. and Appellant had Sex on June 27th, 2004. Which is insufficient to prove beyond a reasonable doubt that the crime occurred.

A Reviewing Court will reverse a conviction for insufficient evidence only where no rational trier of fact could find all elements of the crime were proved beyond a reasonable doubt. Smith, 155 Wn.2d at 501. Salinas, 119 Wn.2d at 201. The Court can infer criminal intent from conduct, and circumstantial evidence as well as direct evidence carries equal weight. State v. Varga 151 Wn.2d 179, 201, 86 P.3d 139 (2004); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A defendant is innocent until proven guilty by the State. Thus, a burden of persuasion wrongly placed upon a defendant implicates Constitution rights of Due Process of the Law under the Fourteenth Amendment to the United

States. State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996); State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135, cert denied. 513 U.S. 919, 115 S.Ct. 299 (1994).

Due Process requires the State to bear the burden of persuasion beyond a reasonable doubt for every element of the crime charged. Deal, 128 Wn.2d at 698. Hanna, 123 Wn.2d at 710. The State may use evidentiary devices, such as presumptions and inferences, to assist it in meeting its burden of Proof. Deal 128 Wn.2d at 699.

Here in this case, there was "No Circumstantial Evidence." "No Direct Evidence." And "No Physical Evidence" that "any crime" ever happened on June 27th, 2004. Other than the Testimony of the Only Witness and Victim B.D. which could only remember the date because it was the same as her birthday.

On the Date of Count II, June 27, 2004. The Only Proof offered by the State in the Prosecution of Appellant was that the Witness Testified that she Remembered that Date. RP. 352. This is dispite the fact that the only time B.D. Babysit the Appellant's Children on "Wednesday's and Thursday's" after School. RP. 336, line 7. RP. 351 line 7. RP. 376 line 20. RP. 400 line 2.

Appellant's Counsel introduced into evidence a Calendar that showed the was a "Sunday." Exhibit 11. RP. 506. The fact that the Witness testified that she only babsit the children or was in the residence on Wednesday's and

Thursday's alone Prove beyond a Reasonable Doubt that No crime was committed on June 27th, 2004. For June 27th, 2004 was a Sunday as proven by the witness, introduced evidence, and the calendar date.

Given the Prosecution every conceivable evidence in the Most Favorable Light, There was insufficient evidence that oral sex occurred during the Month of June, or that the crime was committed. Further, even Admitting All inference that can be drawn from the One Statement of the alleged victim as truth, there was insufficient Evidence that the Crime occurred in the month of June for the Witness did not know the dates, or the time of day, or any other facts that would support that findings of guilt.

A Charging Information is the bases of the Crime Charged in which it informs the Defendant of the Crime in which he must defend himself in the court of law. State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). All Essential elements of the Crime must appraise the defendant of the crime charged. And allow the defendant to prepare a defense. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

Herein, there was no evidence whatsoever that any crime occurred in the month of June 2004. And this Court must reverse the Conviction as to Count II, as charged in the Charging Information, for there was no evidence that showed any crime was committed. And where there is

no evidence of an actual crime, it is impossible for the Trier of Fact to find Appellant Guilty of the Crime Charged, based upon the ONLY statements as to the Date of June 27th 2004 being; "I Looked at the Calendar when I got home." RP. 356 line 25. But could not remember what day of the Week it was. Thus it was insufficient, let alone to Prove that the Crime happened on June 27th as charged.

Further, to prepare and defend against a charged crime that the State failed to Show was possible, with the Witness Testimony, Calendar, evidence, or the lack therein, that the Charged Crime required in order to find him guilty of that charge. For the Witness was Contradicted in her Testimony

Under the Law, when there is insufficient evidence of the crime charged to Prove beyond a Reasonable Doubt the Crime Charged this Court must reverse the Conviction as to Count II, as charged in the Charging Information, for there was no evidence that showed any crime was committed. State v. Green, 94 Wn.2d 216, 220-222, 616 P.2d 628 (1980).

B. SUFFICIENCY OF THE EVIDENCE OF THE CHARGED CRIME IN COUNT I. PROOF BEYOND A REASONABLE DOUBT.

Appellant states and argues that there is Insufficient Evidence to support the Crime Charged in Count I of the Charging Information.

Count I reads;

> That Michael Shannon Derouen, in the State of Washington, on or about the period between the 1st day of June 2004, and the 26th day of June did unlawfully and feloniously, being at least 48 months older than B.D. (DOB 3/27/1989), engaged in sexual intercourse with B.D. who is at least 14 years old but less than 16 years old and not married to the defendant, contrary to RCW 9A.44.079, and against the peace and dignity of the State of Washington."

The test for determining sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d at 201, State v. Craven, 67 Wn.App. 921, 928, 841 P.2d 774 (1992).

Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably

can be drawn therefrom. Salinas 119 Wn.2d at 201, Craven 94 Wn.App. 928.

Appellant states that there was Insufficient Evidence to Prove the Crime Charge in Count I. In this case the Crime here has four (4) Elements to the crime, in Count I, which were found in the Jury Instructions. (1) That on or about between the dates of 1st day of June, 2004, and 26th day of June did unlawfully and feloniously, being at least 48 months older than B.D. (DOB 3/27/1989) engaged in sexual intercourse with B.D. (2) That B.D. was at least fourteen years old but less than sixteen years old at the time of the sexual intercourse and was not married to the defendant; (3) That B.D. was at least 48 months younger than the defendant; and (4) The acts occurred in the State of Washington. See Jury Instruction #7.

Appellant Argues that there was Insufficient Evidence to prove beyond a reasonable doubt as to the Crime Charged in Count I. That Crime being "Rape in the Third Degree." base upon only a "Statement" that Appellant and B.D. had Oral Sex sometime before June 27, 2004.

Appellant states that the "Only" Evidence of the Count I. Was the Witness testifying that she had Oral Sex with Appellant Once, Maybe Twice at an "Unknown" prior date to June 27, 2004. RP. 352, lines 11-20. (no dates) 355 Lines 9. No Date.

The actual testimony of the Witness/Victim was "Q.

Do you remember when the first incident of oral sex was.? A. Not Specifically, but not terribly long before we had actual sex."

After reviewing the Evidence in the most favorable light to the State. No Rational Trier of fact could have found the essential elements of this crime beyond a reasonable doubt. See State v. Smith 155 Wn.2d 496, 501, 120 P.3d 559 (2005). For here in this case the Only Evidence as to the Crime Charged in Count I. Was that B.D. and Appellant had Oral Sex "**Sometime**" between June 1st, and June 27th, 2004. Which is insufficient to prove beyond a reasonable doubt that the crime occurred.

A Reviewing Court will reverse a conviction for insufficient evidence only where no rational trier of fact could find all elements of the crime were proved beyond a reasonable doubt. Smith, 155 Wn.2d at 501. Salinas, 119 Wn.2d at 201. The Court can infer criminal intent from conduct, and circumstantial evidence as well as direct evidence carries equal weight. State v. Varga 151 Wn.2d 179, 201, 86 P.3d 139 (2004); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A defendant is innocent until proven guilty by the State. Thus, a burden of persuasion wrongly placed upon a defendant implicates Constitution rights of Due Process of the Law under the Fourteenth Amendment to the United States. State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996

(1996); State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135, cert denied. 513 U.S. 919, 115 S.Ct. 299 (1994).

Due Process requires the State to bear the burden of persuasion beyond a reasonable doubt for every element of the crime charged. Deal, 128 Wn.2d at 698. Hanna, 123 Wn.2d at 710. The State may use evidentiary devices, such as presumptions and inferences, to assist it in meeting its burden of Proof. Deal 128 Wn.2d at 699.

Here in this case, there was "No Circumstantial Evidence." "No Direct Evidence." And "No Physical Evidence" that "any crime" ever happened between June 1st, and June 26, 2004. Other than the Testimony of the Only Witness/Victim which could not remember Any Dates.

The Trial Court Record ravels that the witness/victim B.D. testified at RP. 353 that; "Q. Okay. But your believe it was in that month of June.? A. Yes."
Q. Okay. That first time that you had oral sex, how--I know you can't remember the exact date." RP. 363 lines 14-15.

A "Belief" as to a Month that a crime was committed, is not Evidence that the Crime existed, nor is it sufficient to Prove beyond a Reasonable Doubt that a crime was committed sometime between June 1st, and June 26th, 2004.

Given the State the Most Favorable Light, There was insufficient evidence that oral sex occurred during the Month of June, or that the crime was committed. Further,

To Prove beyond a Reasonable Doubt that a crime was committed between June 1st, and 26th 2004. The State had to produce some kind of Evidence, other than "the Belief" of the alleged victim. And "Belief" is not evidence.

Under the Jury Instructions, Element (1) in Count I. stated that the State must prove beyond reasonable doubt that the crime was committed between June 1st, 2004, and June 26th, 2004. And there was No Evidence to support this Element of the Crime Charged.

Given the Prosecution every conceivable evidence in the Most Favorable Light, There was insufficient evidence that oral sex occurred during the Month of June, or that there was a crime committed. Further, even Admitting All inference that can be drawn from the One Statement of the alleged victim as truth, there was insufficient Evidence that the Crime occurred in the month of June for the Witness did not know the dates, or the time of day, or any other facts that would support that findings of guilt.

Appellant states that the Charging Information is the bases of the Crime Charged in which it informs the Defendant of the Crime in which he must defend himself in the court of law. State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). All Essential elements of the Crime must appraise the defendant of the crime charged. And allow the defendant to prepare a defense. State v. Vangerpen, 125 Wn.2d 782, 787, 808 P.2d 1177 (1995). And

herein, the crime was the belief that allegedly sometime in the year of 2004, Appellant and B.D. had Oral Sex Once, maybe twice. On some unknown date and time.

Herein, there was no evidence whatsoever that any crime occurred in the month of June 2004. And it was impossible for Appellant prepare and defend against charges that the State failed to Show that the Charged Crime happened on "any given date". That was not contradicted by the State's own Witness victim.

Under the Law, when there is Insufficient Evidence to Prove beyond a Reasonable Doubt the Crime Charged this Court must reverse the Conviction as to Count I, as charged in the Charging Information, for there was no evidence that showed any crime was committed. And where there is insufficient evidence of "any crime" the conviction must be reversed.

C. PROSECUTION VINDICTIVENESS, DUE PROCESS IN ADDING ADDITIONAL CHARGES WHEN DEFENDANT REFUSED TO PLEAD GUILTY. ALL TO INCREASE PUNISHMENT AND AGGRAVATE THE CRIMES CHARGED.

Appellant states and argues that the Deputy Prosecutor Ms. Sanchez, for the County of Pierce in the State of Washington violated Appellants Rights by being Vindictive and Adding more charges to Appellant's Charging Information when he refused to Plead Guilty. CP. 59-60.

Appellant was originally charged By Charging Information and Supporting Probable Cause with Two Counts of Rape in the Third Degree on March 18, 2010. The Count I. was based upon the Time Frame of June 1st to June 27th 2004. And Count II being just June 27th 2004.

When Appellant Refused to take a Plea of Guilt, based upon his Actual Innocence, the Prosecution Amended the Charging Information on April 27, 2011 (over a year after the original charge) to add Two More Counts of Rape in the Third Degree. Counts III, was based upon the dates of June 28, 2004 through October 31st, 2004, and Count IV. November 1st 2004 through March 26th, 2005.

The State did not Introduce any New Evidence, or offer a New Probable Cause. The Amended Charging Information was still based upon the Probable Cause of March 18, 2010. The New Charged Crimes were solely based upon Appellant's Refusal to except the Plea that was being offered.

A prosecutor is a quasi judicial officer who represents the State and must act impartially. A prosecutors duty to do justice on behalf of the public transcends mere advocacy of the State's case. The prosecutors ethical duty is to seek the fairest, rather than necessarily the most serve outcome. United States v. Jones, 983 F.2d 1425, 1433, (7th Cir. 1993); State v. Korum, 86 P.3d 166, 173 (2004).

Under the sentencing reform act of 1981 (SRA). The Legislature gave prosecutor's great latitude in determining what charges to be filed against a defendant. State v. Lewis, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990). Nonetheless, the Legislature did not leave the prosecutor's discretion unbridled. The Legislature limited the prosecutor's charging discretion as;

> (1) The prosecutor should file charges which adequately describe the nature of the defendant's conduct. Other offenses may only be charged if they are necessary to endure that the charges;
> (a) Will significantly enhance the strength of the State's case at trial; or
> (b) Will result in restitution to all victims.
> (2) The prosecutor should not overcharge to obtain a guilty plea.
> Overcharging included;
> (a) Charging a higher degree;
> (b) Charging additional counts."
> RCW 9.94A.411(2)

This standard is intended to direct prosecutors to charge those crimes which demonstrate the nature and seriousness of a defendant's criminal conduct.

In addition to the Legislative limitations, there are Constitutional Restraints on a prosecutors exercise of discretion in charging crimes;

> A prosecutor's discretion to reindict a defendant is constrained by the due process clause. Once a prosecutor exercises his/her discretion to bring certain charges against a defendant, neither he/she nor their successor may, without explanation, increase the number of, or severity of those charges in circumstances which suggest that the increase is retaliation for the defendant's assertion of statutory right or constitutional rights. Hardwick v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1977) cert denied, 434 U.S. 1049, 98 S.Ct. 897 (1978); Korum, 86 P.3d at 173.

This case involves Appellant's Charging Information being raised from Two (2) Counts, too Four (4) Counts a Year After the Original Charging, based on the Same Charge. Upon the "Exact S me Probable Cause" as the First Charging Information so that the State could ask for the Statutory Maximum Sentence of 60 Months plus Community Supervision, instead of the Standard Sentence of 0 to 12 Months.

A Close scrutiny of the Charged crimes show that Nothing in Appellant's case Changed from the Date of the Original Charging, and that the Amendment to the Charged Crimes was because Appellant's refusal to Plead Guilty.

There was No New Evidence, No New Statements, No New Witness, or Additional Victims. Nothing to Justify the Additional Two Counts being added to the Charging

Information other than the Prosecutor's vindictiveness at Appellants refusal to Plead Guilty.

The Courts recognized in State v. Johnson, 92 Wn.2d 671, 675-76, 600 P.2d 1249 (1979), That the Legislatures enactment of RCW 9A. with it's more clearly defined classification of crimes by degree, was intended to eliminate the need to enhance punishment by "pyramiding" charges. State v. Vladovic, 99 Wn.2d 413, 432-33, 662 P.2d 853 (1983).

In this Case, the Prosecution offered a Plea on Counts I and II, which is the original charged crimes, and Appellant would serve only Community Placement, and have to Register if he Plead Guilty to the Crime Charged. The State would have been held to the SRA to Impose a Standard Sentence of only 0 to 12 Months maximum Incarceration based upon an Offender Score o at the time of the crime, and 1 as "Other Current" offenses.

If the State had Not Charged More Crimes, Appellant would have never faced a Prison Sentence. But the Prosecution charged Counts III and IV, then counted Each "Other Current Crimes" as 3 Points each, in order to elevate the Offender Score to 9 (see argument D) And a Mandatory Sentence of the Maximum 60 Months. But only with the Additional Charged Crimes.

A prosecutor may not vindictively file a more serious crime in intentional retaliation for a defendant's lawful

exercise of a procedural/constitutional right such a his right to a jury trial. United States Constitutional Amendments V. VI. XIV, Washington State Constitution article 1 §§ 21, 22. State v. Bonisisio, 92 Wn.App. 783, 790, 964 P.2d 1222 (1998).

The remedy for prosecutorial vindictiveness is dismissal of the charges, ie, that is the original charges and or those added vindictively. United States v. Meyer, 810 F.2d 1242, 1249, cert denied, 485 U.S. 940, 108 S.Ct. 1121 (1988); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). And Appellant asks this Court to Grant the appropriate relief of dismisal of all the criminal charges herein based upon the prosecution vindictively adding charges for the sole purpose of ensuring that Appellant served the maximum sentence for his exercise of his rights.

D. THE SENTENCING COURT VIOLATED THE SENTENCING GUIDELINES WHEN IT IMPOSE A SENTENCE BASED UPON AND INCORRECT CALCULATION OF THE OFFENDER SCORE THAT SHOULD HAVE BASED UPON THE LAWS OF 2004.

Appellant argues that the Trial Court Erred when it imposed a Sentence of "the Statutory Maximum" Class C. Felony without (1) Properly following RCW 9.94A.525. (2) Properly following RCW 9.94A.589 and (3) Failed to follow the Sentencing Guidelines Manual. § III 175. And that the Offender Score is In Error for it should be 3 Points Maximum with a sentence of 0 to 12 months, and Not 9 Points, and a Maximum Sentence of 60 Months Plus Community Placement. (1) Appellant argues that the Trial Court violated RCW 9.94A.525, when it failed to comply with the Statutory Laws of Sentencing. Appellant's Offender Score was calculated by the Prosecution at 9 Points (RP. 759) And not by the Law which states the Court not the Prosecutor "Shall" (shall being mandatory) Calculate the Offender Score under. State v. Haddock, 141 Wn.2d 103, 104, 3 P.3d 733 (2000); See also RCW 9.94A.525 Which states;

RCW 9.94A.525

> "The offender score is measured on the horizontal axis of the "sentencing Grid. The offender score rules are as follows.;
> The offender score is the sum of points accrued under this section rounded down to the neared whole number.
> (1) A prior conviction is a conviction which exist before the date of sentencing for the offense which the offender score is being computed. Convictions entered or sentenced on the same date at the conviction for which the offender score is being computed shall

"be "deemed "Other Current Offenses" within the meaning of RCW 9.94A.589."

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all separately, except;
(i) Prior offenses which were found, under RCW 9.94A.589(1)(a) to encompass the same criminal conduct, shall be counted as one offense,
The offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses...."

From the Statute the Court Shall Determine the Offender Score. Not the Prosecutor. Herein, there is no Determination from the Trial Court as to what the Offender Score was to be. And without the Determination as to the Offender Score by the court the Sentence imposed is beyond the court's jurisdiction.

The Trial Court erred when it simply took for Granted what the Prosecution claimed to be the Offender Score, and never made any determination as to the Points or whether the Sentence was in fact a "Mandatory" sentence.

(2) Appellant states that the Court's Calculation violates the Sentencing Guidelines Manual of 2004 § III 175.

The Washington State Sentencing Guidelines are listed in the Statutory Laws of RCW 9.94A.525 as containing the Horizontal Axis.

Section III-175. Subsection 3, states; "OTHER CURRENT OFFENSES: (Other current offenses which do not encompass the same criminal conduct count in offender score)".

Under the Sentencing Guidelines, Other Current Offenses

"Which encompass the Same Criminal Conduct "DO NOT COUNT" in the Offender Score. Thus making Appellant's Offender Score in Error of the Law and must be corrected. For the Four (4) Counts that Appellant was found guilty of All constitute the Same Criminal Conduct. See Section (3). This Court must also keep in Mind that the Crimes Committed where from 2004, and not after some of the "Amendments made to the Stautes during the 2006, 2008, and 2010 Amendments to the Sentencing Reform Act. See RCW 9.94A.345. State v. Varga, 151 179, 191, 86 P.3d 139 (2004); State v. Delgado, 148 Wn.2d 723, 726, 63 P.3d 792 (2003); State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007).

Again herein this case the Trial Court made No Findings as to whether the Crimes constituted the Same Criminal Conduct. And thus, it violated the Sentencing Reform Act. And Appellant's rights to a fair and just sentence. See RCW 9.94A.030.

(3) Appellant argues that the Trial Court violated RCW 9.94A.589 of Same Criminal Conduct, when it failed to comply with the Laws of the Sentencing Reform Act and perform its duty to as provided by Legislative Law.

The Sentencing Reform act as passed by the Washington State Legislation stated "Same criminal conduct" as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. See laws of 1987

ch. 456, § 5, p. 1980. State v. Collicott II, 118 Wn.2d 649, 667-68, 827 P.2d 263 (1992); State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987).

Here the Same criminal conduct test can be satisfied by the Charging Information for Counts II through IV.

> Charging Information Counts II, III, IV.
> "a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely in respect to time, place and occasion that it would be difficult to separate proof of one charge and from proof of the others, committed as follows;"

As can be seen in the Charging Information, Each Count herein, relies on the Exact Same Evidence as the other counts. And are "So Closely in respect to Time, Place and Occasion.

There is no question that the Evidence that supported Count I, also supported Counts II through IV. The Simple Statement of B.D. that the Crime occurred. And that she did not remember any specific dates or even exactly what year.

RCW 9.94A.589(1)(a) states

> "Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for tow or more current offenses, the sentencing range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score; PROVIDED, that if the **Court Enters** as Finding that some or all the current offenses encompass the same criminal conduct then those current offenses shall be counted as one Crime...."

Appellant was found guilty of Four (4) Counts of a Class C, Felony, that were based upon the same criminal Conduct. But the Trial Court Failed to Follow the Law and it Failed to made any Finding as to the Current Offenses. It left the Calculation of the Offender Score totally up to the Prosecutor, who in this case was Vindictive, Overcharging, and Over sentencing because Appellant exercised his right to a Trial.

It was Error of the Trial Court to fail in its Duty to make a Determination on the Record as to the Offender Score, and as to Same Criminal conduct as stated by the Courts in State v. Collicott, 118 Wn.2d 649, 667-68, 827 P.2d 263 (1992); State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987); In Re Brooks, 166 Wn.2d 664, 665-666, 211 P.3d 1023 (2009). When a Appellant asks a question of the determine a Lawful Sentence under the Sentencing Reform Act. The Court must review the Issues De Novo. State v. Miller, 156 Wn.2d 23, 27, 123 P.3d 827 (2005).

Appellant states that the Sentence in this case must be reversed and sent back to the Trial Court for a Proper Determination of "Same Criminal Conduct" and the Proper sentencing of 0 to 12 months incarceration.

CONCLUSION

Appellant states that he has shown through the Record of the Court that there is Insufficient Evidence of Counts I, and II. And that Counts III, and IV were added out of

Vindictive Prosecution for Appellant's exercise of his constitutional Rights to a fair and Impartial Trial.

Further, the Record supports that the Trial Court Abused its Authority when it failed to comply with Statutory Law and make Proper Determinations of the Offender Score, Same Criminal Conduct making a Sentence which is not authorized by the Sentencing Reform act that must be corrected.

Respectfully Submitted

Dated this 27th day of August, 2012

Michael Derouen #351282
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WASHINGTON STATE COURT OF APPEALS
DIVISION II.

STATE OF WASHINGTON,	:	NO: 42893-8-II
Respondent,	:	
	:	AFFIDAVIT OF SERVICE
V.	:	
MICHAEL S. DEROUEN,	:	
Appellant.	:	

IDENTITY OF PARTY.

COMES NOW the Appellant Michael Derouen, by and through Pro Se with Counsel, and swears under the penalty of perjury that I placed in the Stafford creek correction center mail system the following;;

WASHINGTON COURT OF APPEALS
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Items sent to each party.

APPELLANT'S PRO SE SUPPLEMENTAL BRIEF

Dated this 27th day of August, 2012

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